STATE OF MICHIGAN

IN THE SUPREME COURT

SHAUNTE JOHNSON,

Plaintiff-Appellant,

v

BEST BUY COMPANY, INC.,

Defendant-Appellee.

Supreme Court No. 169404

Court of Appeals No. 363807

Wayne County Circuit Court
Case No. 21-005281-NH

Hon. Muriel Hughes

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BRIEF OF *AMICI CURIAE* THE RETAIL LITIGATION CENTER, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE MICHIGAN CHAMBER OF COMMERCE, THE MICHIGAN RETAILERS ASSOCIATION, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. IN SUPPORT OF DEFENDANT-APPELLEE

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STATEMENT OF QUESTION PRESENTED

If the adhesion contract analysis in *Rayford v American House Roseville I, LLC*, ___ Mich ___ (July 31, 2025) (Docket No. 163989), applies to determine the enforceability of the arbitration policy at issue, does the Federal Arbitration Act, 9 USC 1 et seq., preempt the application of *Rayford* to the facts of this case?

The trial court did not answer.

The Court of Appeals did not answer.

Appellant answers:	No.
Appellee answers:	Yes.
Amici Curiae answer:	Yes.

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INTEREST OF *AMICI CURIAE*[1]

The Retail Litigation Center ("RLC") is a 501(c)(6) nonprofit trade association that represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant cases.

Since its founding in 2010, the RLC has filed more than 250 amicus briefs on issues of importance to the retail industry. RLC members are often defendants in employment disputes that involve arbitration provisions such as this one. The RLC has a strong interest in ensuring that courts enforce arbitration provisions so that its members can quickly and efficiently resolve disputes.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts—both federal and state. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

[1] *Amici* affirm that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *Amici*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

The Chamber, as the largest representative of American employers, has a strong interest in the enforcement of contracts and their arbitration provisions. Businesses reasonably expect that arbitration provisions in their consumer and employment contracts—including standard form contracts of which the large majority of employment contracts are—will be enforced as written. They budget and plan with the expectation that this fast, reliable, and informal dispute resolution process will be allowed and enforced according to their agreements' terms.

The Michigan Chamber of Commerce (the "Michigan Chamber") is the leading voice of business in Michigan. The Michigan Chamber advocates for job providers in the legislative and legal forums and represents approximately 5,000 employers, trade associations, and local chambers of commerce of all sizes and types in every county of the state. The Michigan Chamber's member firms employ over 1 million Michiganders. Many of its members employ arbitration provisions to simplify and streamline dispute resolution.

The Michigan Retailers Association ("MRA"), represents the interests of its nearly 5,000 member businesses, their 15,000 stores and websites that employ over 870,000 Michiganders, and the countless citizens who visit and shop in its members' retail establishments every day. MRA is a voluntary nonprofit association of corporate and other business interests that form the voice of Michigan's retail industry. Established in 1940, MRA provides various business services, education, and advice to its members in order to promote Michigan's retail and economic climate.

As an advocate for its membership, MRA represents its members' interests before state and federal legislatures, executive branch agencies, and the courts. Through these advocacy efforts, MRA seeks to promote good policy that positively impacts the retail industry and the economy as a whole by reducing costs and other burdens for its members. It believes that a heightened standard for employment-contract arbitration provisions will increase costs and burdens for its members and Michiganders.

The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the Nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members. The NFIB Legal Center routinely files amicus briefs on issues of importance to NFIB's members. Arbitration plays a critical important role in small business dispute resolution processes. Small businesses rely on arbitration provisions in order to promptly and efficiently resolve disputes while avoiding litigation costs.

In short, *Amici*'s members regularly employ arbitration agreements to resolve consumer and workplace disputes. Arbitration allows them to resolve those disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the principles embodied in the FAA and the United States Supreme Court's consistent precedent interpreting the FAA, *amici*'s members have structured millions of contractual relationships around arbitration agreements. The simplicity of arbitration reduces the costs of dispute resolution. And these savings are captured and reinvested in the workforce and other business priorities.

INTRODUCTION

Four decades ago, the United States Supreme Court stated that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 626–27; 105 S Ct 3346; 87 L Ed 2d 444 (1985). Yet that suspicion of arbitration continues to linger and, in the 40 years since *Mitsubishi*, the Supreme Court has repeatedly intervened to ensure that state courts respect the Federal Arbitration Act's (the "FAA") command to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms," *AT&T Mobility LLC v Concepcion*, 563 US 333, 339; 131 S Ct 1740; 179 L Ed 2d 742 (2011).

Appellant purports to respect that equal-treatment command, but nevertheless urges this Court to apply heightened judicial scrutiny—whether that be framed as unconscionability or any other doctrine requiring more searching judicial review—that treats arbitration as an inherently less fair method of dispute resolution than litigation in court. She analogizes arbitration to the deadline-to-sue provisions in *Rayford*, which shortened an employee's time to sue. But *Rayford*'s concern was that shortened limitations periods would cause employees to lose *substantive* rights. Arbitration does no such thing. It is a procedural mechanism for *vindicating* substantive rights, not abridging them. And Appellant has not identified any particular arbitration procedure or process selected in Best Buy's employment agreement that limits substantive rights. She merely objects to arbitration *generally*.

As a result, despite her contrary disclaimers, Appellant's arguments run squarely into the FAA. She urges this Court to treat arbitration agreements in form employment contracts with general suspicion. But Section 2 of the FAA "preclude[s]

States from singling out arbitration provisions for [such] *suspect* status." *Doctor's Assoc, Inc v Casarotto*, 517 US 681, 687; 116 S Ct 1652; 134 L Ed 2d 902 (1996) (emphasis added).

Appellant cannot avoid this conflict by characterizing her proposed analysis as merely the application of an evenhanded framework to standard form employment contracts. Section 2 of the FAA commands that "courts must place arbitration agreements on an *equal footing* with *other contracts* and enforce them according to their terms." *Concepcion*, 563 US at 339 (emphasis added & cleaned up). Applying heightened scrutiny to arbitration provisions in form employment contracts but not in any other sort of contract, as Appellant invites this Court to do, would squarely violate that command. Indeed, the Supreme Court in *Southland Corp v Keating*, 465 US 1; 104 S Ct 852; 79 L Ed 2d 1 (1984), rejected just such an argument. It doesn't fare any better 42 years later.

The Supreme Court has admonished state supreme courts to hew closely to the FAA. If this Court grants the Application, it should either decline to extend *Rayford*, as Appellant requests, or otherwise conclude that its extension here is preempted by the FAA.

ARGUMENT

I. The FAA Preempts Heightened Scrutiny Resting on General Suspicion of Arbitration.

A. *Discriminatory suspicion treating arbitration as an inferior forum is the unavoidable premise of Appellant's arguments.*

Extending *Rayford*'s heightened scrutiny to arbitration agreements would conflict with the FAA because, at its core, it would treat arbitration as an inferior method of vindicating substantive rights.

Rayford applied its heightened scrutiny in the specific context of provisions risking the abridgment of *substantive*, not procedural, rights. This Court in *Rayford* stated:

> When limitations periods are created and changed on a case-by-case basis . . . the employee's *ability to protect* their legislatively and constitutionally protected right to be free from discrimination *may be significantly curtailed*. The claims period is not only abbreviated, but *the purpose of these statutes—to hold employers accountable—may be curtailed as well*, depending on how short the contractual limitations period is. [*Rayford*, ___Mich at___; slip op at 29 (emphasis added).]

As this Court further explained, "[i]t . . . simply makes little sense to allow employers to subject employees to unreasonably short limitations periods that might, in practice, *preclude* statutory claims." *Id.* at 27 (emphasis added); *id.* at 29 ("The difference between an employee having three years to file a lawsuit, as opposed to just six months, cannot be understated."). Because of these *substantive* concerns, this Court held: "Adhesion contracts with provisions shortening the statute of limitations in the employment context are subject to *heightened* judicial scrutiny to determine whether the provisions are reasonable." *Id.* at 28 (emphasis added). In short, *Rayford*'s "heightened" standard arises because of a concern that employees will entirely and permanently lose or effectively waive their claims to *substantive* rights. It is these substantive concerns that "warrant[ed] *close judicial scrutiny* of the challenged shortened limitations provision." *Id.* at 33 (emphasis added).

Appellant argues that this Court should extend *Rayford*'s "heightened judicial scrutiny" to arbitration agreements because arbitration similarly threatens the loss of substantive rights. Appellant specifically asserts that "*Rayford*'s analysis applies" to "employer-imposed, non-negotiated boilerplate employment terms" such as arbitration, in large part, "because they may restrict the practical *enforcement of statutory* *civil rights claims*." (Johnson Suppl Br 9.) And Appellant asserts that "Best Buy's arbitration policy is *precisely* that kind of term," *i.e.*, one that restricts the enforcement of civil rights. (*Id.* (emphasis added).) In other words, Appellant urges this Court to subject arbitration provisions in standard form employment contracts to more demanding scrutiny because of her general suspicion that arbitration fails (or may fail) to vindicate substantive statutory rights adequately. She considers arbitration an inherently inferior forum less capable than court of providing full justice.

The Court should be under no illusions that Appellant's proposed heightened-scrutiny analysis for standard employment contracts remains neutral towards arbitration. Appellant ostensibly disclaims that she is arguing that arbitration's defining features—change of forum, who decides, the management of discovery, and appellate review—"make arbitration categorically invalid." (*Id.*at 16.) But she *does* argue that these defining features make an arbitration clause *categorically suspect*, especially where "statutory civil rights claims" are at issue. As explained *infra* I.B, the FAA forbids such categorical suspicion—treating arbitration as a second-class form of dispute resolution inherently less fair or more prone to error than traditional litigation in court.

This Court need not take *Amici*'s word that Appellant's heightened scrutiny proposal ultimately rests on general suspicion of arbitration. Appellant's words speak for themselves. The crux of her argument is that the defining features of arbitration warrant heightened scrutiny for unconscionability, reasonableness, and assent:

> An arbitration policy changes where the plaintiff may proceed, who decides the case, whether the proceeding is public, whether a jury decides facts, how discovery is managed, and how appellate review occurs. Plaintiff does not argue that those consequences make arbitration categorically invalid. But they are relevant to whether an employer-imposed adhesive term is reasonable and whether any waiver was formed through meaningful assent. That is especially

> true because this case involves statutory civil rights claims. (Johnson Suppl Br 15-16.)

Appellant accordingly urges this Court to extend *Rayford*'s heightened scrutiny to arbitration clauses because, in her view, such clauses "*materially* restrict[] enforcement of statutory rights." (*Id.* at 5 (emphasis added).) But arbitration only "materially restricts" such enforcement if it remains inherently incapable of ensuring or providing *equal* enforcement of statutory rights compared to litigation in court. That is the unavoidable premise of Appellant's argument. As a result, that argument ultimately rests on impermissibly unequal treatment and suspicion of arbitration, notwithstanding her contrary disclaimers. Indeed, Appellant tellingly frames the relevant question in this case as "whether Best Buy proved . . . a valid and enforceable adhesive employment term that removed Ms. Johnson's statutory claims *from a public court and civil jury*." (*Id.* at 9 (emphasis added).) That defining feature of arbitration, according to Appellant, triggers more demanding review requiring greater overall substantive fairness, clearer notice, and more explicit assent than for other contracts. As discussed further below, the FAA prohibits such discriminatory, anti-arbitration applications of otherwise general contract defenses like unconscionability.

Appellant further argues that arbitration clauses are especially suspect and warrant heightened judicial scrutiny if they cover "claims arising out of the employment application, employment, and termination of employment, including *discrimination, harassment, retaliation, wrongful discharge and wage claims*." (*Id.* at 6 (emphasis added).) Appellant's underlying premise is either (1) that arbitration supposedly poses a unique risk of unfairness or error for employment claims or (2) that such claims simply remain too substantively important or sensitive to entrust to arbitrators without special judicial scrutiny—or a combination of both. Either way, Appellant's argument rests on the core premise that arbitration remains a uniquely risky or otherwise poor fit for employment and civil-rights claims. Appellant's entire brief is laden with this sort of inherent suspicion of arbitration, both in general and for employment claims in particular.

Indeed, Appellant's failure to challenge any of Best Buy's specific arbitration procedures confirms that her entire argument rests on general suspicion of arbitration as an inferior forum. And, here, Best Buy's arbitration procedures are fulsome. (Best Buy Suppl Br. 16.) At bottom, according to Appellant, what should trigger *Rayford*'s especially "close judicial scrutiny," *Rayford*, ___Mich at___; slip op at 33, is simply that arbitration *is not litigation in court*. As explained below, the FAA prohibits applying such a thumb on the scale specifically against arbitration—even for a general contract defense like unconscionability.

B. The FAA prohibits discriminatory applications of general contract defenses resting on inherent suspicion of arbitration.

Just over a century ago, the "FAA was enacted . . . in response to widespread judicial hostility to arbitration agreements." *Concepcion*, 563 US at 339; see also *EEOC v Waffle House, Inc*, 534 US 279, 289; 122 S Ct 754; 151 L Ed 2d 755 (2002) (the FAA's " 'purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts.' " (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24; 111 S Ct 1647; 114 L Ed 2d 26 (1991))). Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any contract*. [9 USC 2 (emphasis added).]

Accordingly, "courts must place arbitration agreements on an *equal footing* with *other contracts* and enforce them according to their terms." *Concepcion*, 563 US at 339 (emphasis added & cleaned up); *Casarotto*, 517 US at 687 (Section 2 requires states to place arbitration provisions " 'upon the same footing as other contracts.' " (quoting *Scherk v. Alberto–Culver Co.*, 417 US 506, 511; 94 S Ct 2449; 41 L Ed 2d 270 (1974))).

The FAA "ensure[s] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 563 US at 344. This means that the FAA "preempts any state rule discriminating on its face against arbitration" but also "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (*oh so coincidentally*) have the defining features of arbitration agreements." *Kindred Nursing Ctrs Ltd Partnership v Clark*, 581 US 246, 251; 137 S Ct 1421; 197 L Ed 2d 806 (2017) (emphasis added). Courts may not apply " 'generally applicable contract defenses' like fraud or unconscionability" in ways " 'that *derive their meaning from the fact that an agreement to arbitrate is at issue*.' " *Id.* at 581 (quoting *Concepcion*, 563 U.S. at 339 (emphasis added)).

"State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act . . . including the Act's national policy favoring arbitration." *Nitro-Lift Technologies, LLC v Howard*, 568 US 17, 17; 133 S Ct 500; 184 L Ed 2d 328 (2012). "It is a matter of great importance, therefore, that *state supreme courts adhere* to a correct interpretation of the legislation." *Id.* at 17-18 (emphasis added). Indeed, the Supreme Court has not been hesitant to overturn state court decisions *per curiam*, without noted dissent, because they failed to apply the FAA and the Supreme Court's precedents properly. See, e.g., *Marmet Health Care Ctr, Inc v Brown*, 565 US 530; 132 S Ct 1201; 182 L Ed 2d 42 (2012) (overturning state rule prohibiting arbitration of particular type of claim); *Nitro-Lift Technologies*, 568 US 17 (same); *cf. KPMG LLP v Cocchi*, 565 US 18; 132 S Ct 23; 181 L Ed 2d 323 (2011) (per curiam opinion vacating state decision that failed to examine all claims to determine whether some required arbitration); *Citizens Bank v Alafabco, Inc*, 539 US 52; 123 S Ct 2037; 156 L Ed 2d 46 (2003) (reversing Alabama Supreme Court decision that held debt-restructuring agreement involving Alabama citizens and Alabama bank was not a transaction involving commerce and therefore not arbitrable under the FAA). In particular, "[o]ver the years the Supreme Court has struck down a number of California laws or judge-made rules relating to arbitration as preempted by the FAA." *Chamber of Commerce of the United States of America v Bonta*, 62 F4th 473, 478 (CA 9, 2023).[2]

Even in the application of general contract defenses such as unconscionability, the FAA prohibits the type of general suspicion of arbitration underlying Appellant's proposed extension of *Rayford*'s heightened scrutiny. The entire purpose of Section 2 of the FAA is to "preclude[] States from singling out arbitration provisions for *suspect* status." *Casarotto*, 517 US at 687(emphasis added). And the FAA "reject[s] *generalized* attacks on arbitration that rest on '*suspicion* of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.' " *Green Tree Fin Corp-Alabama v Randolph*, 531 US 79, 89–90; 121 S Ct 513; 148 L Ed 2d 373 (2000) (quoting *Rodriguez de Quijas v Shearson/American Exp, Inc*, 490 US 477, 481; 109 S Ct 1917; 104 L Ed 2d 526 (1989)) (emphasis added).

Section 2 rejects such suspicion of arbitration precisely because "an arbitration agreement . . . does not alter or abridge *substantive rights*; it merely changes how those rights will be processed. . . . By agreeing to arbitrate a statutory claim, a party

[2] In the last 45 years, among the cases in which the Supreme Court has held California legislation or judge-made rules preempted by the FAA include the following: *Viking River Cruises, Inc v Moriana*, 596 US 639; 142 S Ct 1906; 213 L Ed 2d 179 (2022); *Concepcion*, 563 US 333; *Preston v Ferrer*, 552 US 346; 128 S Ct 978; 169 L Ed 2d 917 (2008); *Perry v Thomas*, 482 US 483; 107 S Ct 2520; 96 L Ed 2d 426 (1987); *Keating*, 465 U.S. 1.

does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum." *Viking River Cruises*, 596 US at 653 (quoting *Preston,* 552 U.S. at 359) (cleaned up & emphasis added). In examining a standard, unnegotiated contract's arbitration clause two decades ago, the Seventh Circuit rhetorically asked, "Is the enforcement of this clause unconscionable? How could it be? Arbitration is *just a forum*; people may choose freely which forum will resolve their dispute." *Carbajal v H & R Block Tax Servs, Inc*, 372 F3d 903, 905–06 (CA 7, 2004) (Easterbrook, J.) (emphasis added).

Undeniably, arbitration is a forum offering "the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys Corp v Lewis*, 584 US 497, 505; 138 S Ct 1612; 200 L Ed 2d 889 (2018). Quicker, more informal, and cheaper does not mean less fair, accurate, or protective of claimants' substantive rights. On the contrary, arbitration vindicates those rights in a more efficient way. Indeed, arbitration's quick and cheap process often provides the *only* economically viable opportunity for claimants to pursue small value, individualized claims that might not be worth the higher cost of pursuing in court. Nor does any of this analysis change in the employment context. As the Supreme Court stated in *Circuit City Stores, Inc v Adams*:

> We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." [532 US 105, 123; 121 S Ct 1302; 149 L Ed 2d 234 (2001).]

Thus, Appellant's request that this Court extend *Rayford*'s heightened scrutiny to arbitration provisions in standard, form employment agreements runs headlong into FAA Section 2's equal-treatment rule and the Supreme Court's associated precedents. By urging this Court to extend *Rayford*'s heightened scrutiny based on anti-arbitration assumptions, *supra* pp 3-6, Appellant invites this Court to violate the FAA's equal treatment principle and the Supreme Court's clear precedents. Treating an arbitration clause as if it presents the same risk of permanently losing or waiving a claim reflects an inherent skepticism of arbitration as a second-class forum that is less able than litigation in court to provide full justice and fair adjudication. That is *precisely* the sort of discriminatory hostility and skepticism towards arbitration that the FAA prohibits.

As noted above, over 40 years ago, the Supreme Court observed that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 US at 626–27. Yet, by asking this Court to apply a heightened standard of review—whether formulated as unconscionability or some other defense—simply because a form employment contract contains an arbitration clause, Appellant seeks to return us to that world. The FAA forbids that move. "The cry of 'unconscionable!' just repackages the tired assertion that arbitration should be disparaged as second-class adjudication. It is precisely to still such cries that the Federal Arbitration Act equates arbitration with other contractual terms." *Carbajal*, 372 F3d at 906. The relief that Appellant seeks is preempted by the FAA.

C. Appellant's counterarguments fail.

Appellant insists that extending *Rayford*'s heightened scrutiny to arbitration clauses in standard employment agreements poses no conflict with the FAA because its "reasoning applies" in the "employment-adhesion context, not *because* of arbitration," and thus purportedly does not reflect "an arbitration-specific rule." (Johnson Suppl Br 17-18 (emphasis added).) To be sure, in the abstract, something like unconscionability remains a generally applicable contract defense. But as discussed, Appellant's specific reasons *why* the unconscionability doctrine or some other doctrine requiring more searching review supposedly requires heightened judicial scrutiny in the current context reflect hostility to arbitration in general and for arbitration of employment claims in particular—belying her insistence of neutrality. See *supra* pp 3-6. Appellant appears to argue that, under *Rayford*, arbitration provisions in standard employment contracts demand extra judicial scrutiny for substantive fairness and assent compared to other standard provisions because (1) arbitration supposedly is an inferior forum threatening permanent loss of claimants' substantive rights and (2) that threat is uniquely acute or dangerous for employment-related claims, or such claims are simply too important or sensitive for arbitration. In other words, *Rayford*'s heightened standard should apply precisely because arbitration supposedly is inadequate, error prone, or risky—especially for employment claims—potentially requiring greater fairness and clearer assent than for other provisions and non-employment contracts.

That discriminatory, anti-arbitration reasoning puts Appellant's argument outside Section 2's saving provision, which preserves only generally applicable "grounds as exist at law or in equity for the revocation of *any contract*." 9 USC 2 (emphasis added). Appellant's proposed extension of *Rayford* to arbitration provisions in standard employment agreements would impermissibly "place[] arbitration agreements in a class apart from 'any contract,' " *Casarotto*, 517 US at 688, including other, non-employment contracts with arbitration provisions. It would mean that arbitration agreements in employment contracts were not "be[ing] placed 'upon the same footing as other contracts,' " which is the primary command of Section 2 of the FAA. *Casarotto*, 517 US at 687 (quoting *Scherk*, 417 U.S. at 511).

Indeed, in *Keating*, 465 US 1, the Supreme Court rejected just such an argument. There, a provision of the California Franchise Investment Law provided a defense to arbitration. The Court held "that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity 'for the revocation of *any* contract' but merely a ground that exists for the revocation of arbitration provisions in contracts *subject to the California Franchise Investment Law*." *Id.* at 16 n. 11 (second emphasis added). In other words, the defense was not applicable to all contracts but only to *franchise* contracts and that applicability only to franchise contracts violated the FAA's equal treatment principle.[3] The Court stated, "If we accepted this analysis, states could wholly eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts simply by passing statutes such as the Franchise Investment Law." *Id.* (cleaned up). The Court "rejected this analysis because it . . . would permit states to override the declared policy requiring enforcement of arbitration agreements." *Id.* The Supreme Court has repeatedly applied these principles to strike down state rules prohibiting arbitration of certain types of claims. See, e.g., *Marmet*, 565 US at 532 (holding that FAA preempts "state public policy against predispute arbitration agreements that apply to claims of personal injury or wrongful death against nursing homes"); *Perry*, 482 US at 484 (holding that FAA preempted state law providing that "actions for the collection of wages may be maintained without regard to the existence of any private agreement to arbitrate" (cleaned up)).

The Fourth Circuit applied similar reasoning in *Saturn Distribution Corp v Williams*, 905 F2d 719 (CA 4, 1990). There, Virginia had enacted legislation that prohibited automobile manufacturers from entering into agreements with auto-dealers

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[3] As Best Buy points out, by *Rayford*'s own terms this is what an extension of *Rayford* to an arbitration agreement would do. (Best Buy Suppl. 22 (discussing how in *Rayford* this Court explained "that its test is not generally applicable").)

that had mandatory alternative-dispute-resolution provisions. The court held that the FAA preempted the law. "If Virginia uniformly barred the formation of nonnegotiable contractual terms or declared all contracts of adhesion to be presumptively unenforceable," the court observed, "then the statute at issue would not be at odds with general contract law." *Id.* at 725-26. The problem was that "as a general rule, Virginia [did] not bar parties from making certain provisions of their contracts nonnegotiable." *Id.* at 726. Nor did Virginia law "always, or even usually, presume adhesive contracts to be unenforceable." *Id.* Accordingly, the Virginia statute conflicted with the FAA's equal-treatment rule.

By accepting Appellants' invitation to extend *Rayford*'s heightened judicial scrutiny based on general suspicion of arbitration provisions in standard, unnegotiated employment contracts, this Court would be adopting a discriminatory rule akin to the anti-arbitration legislation struck down in *Keating* and *Saturn Distribution*. Extending *Rayford* in this way would attempt the very impermissible end-around that the Supreme Court rejected in *Keating*. Extending *Rayford*'s close judicial scrutiny—requiring heightened fairness, notice, and assent—to arbitration agreements might only apply to such provisions in standard, form employment contracts. But that heightened review remains impermissibly arbitration-specific, triggered by inherent suspicion of arbitration's defining features. Such heightened scrutiny would not apply equally to non-arbitration terms in employment agreements or otherwise, violating the FAA's equal-treatment rule.

Nor can Appellant avoid FAA preemption by recharacterizing the need for heightened scrutiny as simply a concern to preserve access to the courts. That just repackages the same discriminatory suspicion of arbitration triggering heightened judicial scrutiny. It still specifically targets and disfavors arbitration's defining feature—shifting adjudication of claims from the courts to a more informal forum. And that too violates the FAA's equal-treatment rule. As the Supreme Court held in *Kindred Nursing*, courts are "barred" from "adopt[ing] a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." 581 US at 252. "Such a rule is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment." *Id.*

Any way one slices it, Appellant urges this Court to adopt a rule that disfavors and more rigorously scrutinizes arbitration precisely because *it is not litigation in court*—that is, because of arbitration's defining attributes. And she invites this Court to adopt such a rule that disfavors arbitration in only certain contexts—to apply that rule to one class of contracts. That is exactly what the FAA forbids. This Court should reject Appellant's invitation and ensure that Michigan law does not run afoul of the FAA and the Supreme Court's clear precedents construing it.[4]

II. Employment arbitration benefits businesses and workers.

Contrary to Appellant's assumptions, employment arbitration benefits both businesses and workers alike. Indeed, empirical evidence strongly supports the Supreme Court's observations that arbitration provides an effective method in which to vindicate substantive rights—including in the employment context. See, e.g., *Lewis*, 584 US at 505 ("[A]rbitration . . . offer[s] . . . the promise of quicker, more informal, and often cheaper resolutions for everyone involved."); *Circuit City*, 532 US at 123 ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.").

[4] Best Buy also correctly argues that the adoption of Appellant's argument would disproportionately burden arbitration agreements, which independently would run afoul of the FAA. (Best Buy Suppl Br. 25-29.)

For instance, Lewis L. Maltby, formerly Director of the American Civil Liberties Union's National Task Force on Civil Liberties in the Workplace, described the significant success rate of employees in arbitration. Based on data he examined, employees "won seventy-three percent of the [arbitration] cases they filed." Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum Hum Rts L Rev 29, 45 (1998). Maltby continued:

> Comparisons of the result rates in arbitration versus litigation reveal that, contrary to what many would expect, employees prevail more often in arbitration than in court. For example, an AAA survey of employment arbitration results from 1993-95 shows that employees who arbitrated their claims won sixty-three percent of the time. In comparison, according to federal district court records for 1994, only 14.9% of the employees who took their claims to court won their cases. [*Id.* at 46 (cleaned up).]

Maltby found similar benefits in terms of speed, writing that at that time it took "almost two years (679.5 days) from the time the average employment discrimination case is filed in federal district court until the time it is resolved." *Id.* at 55. By comparison, Maltby found that the "average case in arbitration is resolved in 8.6 months, less than half of the time required for civil litigation." *Id.*

Other, later studies have reached similarly favorable conclusions concerning arbitration. The authors of a 2005 study concluded that "there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true." David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan L Rev 1557, 1578 (2005); see also *id.* at 1569 ("[T]here is no significant difference between the employee win rate in federal court and that in arbitration."). University of Michigan Professor of Law Theodore J. St. Antoine, an eminent labor and employment scholar, reached similar conclusions. In a 2010 article, he observed that "several empirical studies by serious scholars have shown arbitration to be surprisingly favorable to employees as compared with court litigation." Theodore J. St. Antoine, A*DR in Labor and Employment Law During the Past Quarter Century*, 25 ABA J Lab & Emp L 411, 419 (2010). And seven years later he reiterated that conclusion. See Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St J on Disp Resol 1, 16 (2017) ("In different empirical studies . . . arbitration was surprisingly favorable to employees as compared with court litigation.").

In addition, studies have unequivocally found that "arbitration is faster." Sherwyn, Estreicher & Heise, *supra*, at 1578; *see also* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003–Jan. 2004) (finding that arbitration is 33% faster than analogous employment litigation). Speedier time to resolution has a positive effect "[b]ecause employment dispute resolution can be both heart wrenching and financially crippling." Sherwyn, Estreicher & Heise, *supra*, at 1578.

A more recent study released in March 2022 by the Chamber's Institute for Legal Reform confirms what these earlier studies found. That study, which surveyed over 25,000 employment arbitration cases and 260,000 employment litigation cases resolved between 2014 to 2021, came to three significant conclusions. *First*, employees who initiate cases are significantly more likely to prevail in arbitration than in court. "[E]mployees initiated and prevailed in 37.7% of arbitrations that terminated with awards compared to 10.8% of litigations that terminated with awards." Nam D. Pham, Ph.D. & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration*, NDP Analytics 4 (March 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/03/FINAL-ndp-Consumer-and-Employment-Arbitration-Paper-2022.pdf. *Second*, employees on average receive higher monetary awards in arbitrations. Employees "who initiated and prevailed in arbitration were awarded an average of $444,134 ($142,332 in median) compared to an average of $407,678 ($68,956 in median) in litigation." *Id. Third*, arbitration is a speedier way to resolve employment disputes. "[E]mployees who initiated and prevailed in arbitration spent an average of 659 days (623 days in median) from initiation to termination of their claim compared to spending an average of 715 days (578 days in median) in litigation." *Id.*

Employees accordingly do not view arbitration with suspicion. Quite the contrary: a recent survey demonstrated that 61% of employees have a favorable view of using arbitration to decide disputes with their employers. Bill McInturff & Jim Hobart, *Arbitration Online Survey*, Pub. Op. Strategies, at 13 (March 2019), https://instituteforlegalreform.com/wp-content/uploads/media/ILR_Arbitration_Online_Survey_-_Presentation.pdf. Indeed, 23% of employees have a *very* favorable view of arbitration. *Id.* And "[b]y more than two to one, employees prefer[red] using arbitration to settle a dispute with their employer." *Id.* at 15.[5]

Thus, if this Court accepts Appellant's invitation to extend *Rayford* to arbitration clauses in standard employment contracts, not only will that extension conflict with the FAA, it will weaken the mutual practical advantages obtained through arbitration for businesses and workers alike. If an employee challenges the arbitration provision, the business and worker will expend resources addressing that point before they are ever able to get to the merits of the dispute. And businesses may become less keen to offer arbitration provisions in the first instance if they are worried they will be held unenforceable or subjected to additional litigation. Appellant's proposed

[5] Specifically, the survey asked, "Now suppose for a moment you had to sign a contract with your employer. If you could choose the method by which any future disputes would be resolved between you and your employer, which would you choose?" 54% chose arbitration. Only 21% chose filing a lawsuit. 25% had no strong opinion. *Id.*

heightened scrutiny analysis thus would make arbitration more difficult and less frequent—at direct cross-purposes with the rationale for arbitration in the first place.

III. Subjecting employment arbitration to uniquely heightened standards would harm Michigan businesses.

Given the multiple recognized and well-documented mutual benefits of arbitration, it is no surprise that American businesses frequently use mandatory arbitration provisions in their employment contracts. Over 65% of companies with 1,000 or more employees mandate arbitration in employment disputes. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts Is Now Barred for More Than 60 Million American Workers*, Econ Pol'y Inst 2 (Apr. 6, 2018), https://files.epi.org/pdf/144131.pdf. And 53.9% of all nonunion private-sector employers employ such mandatory arbitration procedures. *Id.* Among businesses large *and* small, arbitration is an essential tool in employment contracts. As the Supreme Court recognized in *Concepcion*, "the times in which consumer contracts were anything other than adhesive are long past," 563 US at 346-47, which is also true in the employment context, Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 Harv Negot L Rev 29, 36 (2017) (stating that "consumers rarely form non-adhesive predispute contracts, and *this is largely true* of other individuals" (emphasis added)).

Arbitration is particularly important for small businesses, which, in the words of Governor Whitmer, "form the backbone of Michigan's economy." Press Release, Office of Governor Gretchen Whitmer, Whitmer Announces New Data Showing Record Small Business Growth (May 16, 2022), https://www.michigan.gov/whitmer/news/press-releases/2022/05/16/whitmer-announces-new-data-showing-record-small-business-growth. Michigan businesses overwhelmingly (99.6%) constitute "small businesses" with fewer than 500 employees. *Id.* And those small businesses employ $1.9 million Michiganders, making up nearly half of Michigan's workforce. *Id.* (stating that 48.3% of Michigan workers are employed by small businesses). This exceeds the overall national average of 45.9%. *Frequently Asked Questions About Small Business*, 2024, US SMALL BUS ADMIN OFF OF ADVOC (July 23, 2024), https://advocacy.sba.gov/2024/07/23/frequently-asked-questions-about-smallbusiness-2024/. When small businesses engage in legal disputes, most are settled informally outside of court, with as many as 22% of those disputes settled through arbitration or similar mechanisms. NFIB RSCH FOUND, *NFIB National Small Business Poll The Use of Lawyers*, Vol 5 Iss 2, at 4 (2005), http://www.411sbfacts.com/files/UseofLawyers_poll.pdf.

Because of their more limited resources compared to their larger counterparts,[6] small businesses require cost-saving and cost-effective options, including arbitration, to ensure they can continue operating long-term. In 2024, small businesses reported economic uncertainty as their third-most pressing concern. Holly Wade & Madeleine Oldstone, NFIB Rsch. Ctr., 2024 Small Business Problems & Priorities 9 (11th ed. 2024), https://nfib.com/wp-content/uploads/2024/10/2024-Small-Business-Problems-Priorities.pdf. Moreover, "delayed disposition creates uncertainty . . . It is well understood that the presence of such uncertainty makes businesses less prone to invest and expand operations, and can constrain the availability of capital for investment in business activities." Roy Weinstein et al., *Efficiency and Economic Benefits of Dispute Resolution Through Arbitration Compared with US District Court Proceedings* 16 (Am Arbitration Ass'n, Mar. 2017).

[6] One recent study suggests that a large number of small businesses are operating with less than one month's worth of cash reserves. See Black Enterprise Eds., *On the Brink: 39% Of Small Businesses Are Running On Less Than A Month Of Cash*, YAHOO!FINANCE (Oct. 28, 2025), https://finance.yahoo.com/news/brink-39-small-businesses-running-140000299.html.

Lengthy litigation costs all businesses and the entire economy. One report, which analyzed federal court litigation between 2011 and 2015, concluded that the delay caused by litigation instead of arbitration led to between $10.9 billion and $20 billion in lost opportunity costs for businesses. *Id.* at 17-18. But that captures only part of the picture. "Economists recognize that a given change in economic activity produces benefits or costs in excess of the initial outcome." *Id.* at 22. These "costs or benefits are referred to as 'multiplier effects.'" *Id.*[7] If one accounts for these various multiplier effects, which compound these direct losses, the total estimated costs for businesses associated with litigation delays between 2011 and 2015 amounted to between $28.3 billion and $51.9 billion. *Id.* at 22-23. These litigation delays and costs affect all businesses but disproportionately affect small businesses. "While small businesses account for only 20 percent of the revenue, they bear 48 percent of commercial tort costs, which amounts to $160 billion." David McKnight & Paul Hinton, *Tort Costs for Small Businesses* 12 (U.S. Chamber of Com. Inst. for Legal Reform, Dec. 2023), https://instituteforlegalreform.com/wp-content/uploads/2023/12/Tort-Costs-for-Small-Businesses-12.5.23.pdf.

These litigation costs have further downstream effects, too. In particular, they burden courts. Arbitration reduces judicial caseloads. More litigation—including tangential litigation over whether an arbitration clause is reasonable or unconscionable—clogs courts' dockets. Indeed, between 2004 and 2024, "the number of civil cases [in federal court] pending more than three years rose 346 percent." *The Need for Additional Judgeships: Litigants Suffer When Cases Linger*, US Cts (Nov. 18, 2024), https://www.uscourts.gov/data-news/judiciary-news/2024/11/18/need-additional-

[7] "With respect to resources in limbo due to litigation, multiplier effects would include reduced expenditures by entities during the period of delay. They also will include reduced expenditures by entities that otherwise would have been ultimate beneficiaries of expenditures during the period of delay by the litigating entities." *Id.*

judgeships-litigants-suffer-when-cases-linger. Appellant's requested relief—the extension of *Rayford*'s heightened judicial scrutiny to arbitration clauses in standard employment contracts—will exacerbate this trend, harming businesses, workers, the economy, courts, and society at large.

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, if this Court grants the Application, it should either decline to extend *Rayford* or conclude that its extension is preempted by the FAA. The heightened scrutiny Appellant calls for—whether under the guise of unconscionability or any other doctrine—simply because a standard form employment contract includes an arbitration clause is prohibited by the FAA.

Respectfully submitted,

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MCR 7.312(H)(2)(f) ATTESTATION

I hereby attest that the RLC, the Chamber, the Michigan Chamber, the MRA, are tax-exempt organizations under 501(c)(6) of the Internal Revenue Code, 26 USC 501, and the NFIB Legal Center is a tax-exempt organization under 501(c)(3) of the Internal Revenue Code, 26 USC 501, and, therefore, they are all permitted to file this *amici curiae* brief without a motion, pursuant to MCR 7.312(H)(2)(f).

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation pursuant to MCR 7.212(B). The Brief contains 6,192 words of Century Schoolbook 12-point proportional type and 24-point spacing. The word processing software used to prepare this brief was Microsoft 365.

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